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NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122

Re: Comments on Review of NEPA Regulations

Dear NEPA Task Force:

I was pleased to learn that the Bush Administration is undertaking a review of the National Environmental Policy Act ("NEPA") regulations. As a public lands attorney, I have extensive experience litigating NEPA. I have a strong understanding of the regulations and the ways in which they are usually applied by the courts. The end of each section of this letter includes a specific proposal for change in the language of specific NEPA regulations.

1. Make it clear that the agencies must take a "hard look" at economic and cultural impacts of their decisions

The U.S. Court of Appeals for the Ninth Circuit and other federal courts have ruled that a party claiming economic harm resulting from a government decision may not sue the agency for failure to perform adequate NEPA analysis as to the economic impact of the decision. E.g. Port of Astoria v. Hodel, 595 F.2d 467 (9th Cir. 1979); Nevada Land Action Association v. United States Forest Service, 8 F.3d 713 (9th Cir. 1993). These rulings have the effect of giving priority to the livelihoods of plants, animals, insects and fish over the livelihoods of human beings. While NEPA is a procedural statute and does not dictate the outcome of the decision making process, it tells agencies what factors they must consider and give weight to. However, if the agencies know that they may be subject to lawsuits for unsupported statements in a NEPA document that no economic or cultural impact will result from a government activity, they will be more likely to take a "hard look" at such impacts, along with impacts to plants and animals.

My suggested change captures the intent of NEPA better than current regulations. This should be obvious since the primary requirement of NEPA is to evaluate "major federal actions significantly affecting the quality of the human environment." 42 USC §

4332 (emphasis supplied). The purposes of NEPA were originally expressed by Congress as follows:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 USC § 4321 (emphasis supplied). The act further provides that NEPA is intended “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans[.]” *Id.* § 4331(a) (emphasis supplied). NEPA was never intended to focus on environmental protection to the exclusion of economic and social considerations. Rather, it was intended to consider how to best create harmony between human use and enjoyment of resources and conservation for long-term use. However, NEPA is very clear that it is a use-oriented statute, and that economic and cultural considerations are important:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may -

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

42 USC § 4331(b) (emphasis supplied). These statutory provisions clearly indicate that economic and cultural considerations are important considerations in NEPA analysis. Yet the courts have often interpreted NEPA in an extreme fashion, considering it to be primarily concerned with the preservation of nature and not particularly concerned with the economic and cultural impacts of government decisions. These decisions defeat some

important original purposes of NEPA and should be remedied through regulatory reform. Based on these observations, I suggest that 40 CFR § 1502.23 be modified as follows:

A monetary cost-benefit analysis relevant to the choice among environmentally different alternatives **shall be** considered for the proposed action, **and** shall be incorporated by reference or appended to the statement as an aid in evaluating **the economic, cultural and environmental consequences.** **Such analysis shall be based on high quality economic and anthropological research by qualified members of the interdisciplinary team.** To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, ~~when a cost-benefit analysis is prepared,~~ discuss the relationship between **the cost –benefit analysis** and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives **must** be displayed in a monetary cost-benefit analysis; **but the cost-benefit analysis shall indicate that it may not account for some** important qualitative considerations. In any event, an environmental impact statement **shall** indicate those considerations, **including economic and cultural factors,** which are likely to be relevant and important to a decision.

(Emphasis indicates proposed changes to the current text.) More important, I recommend modifying 40 CFR § 1508.14 as follows:

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (Sec. 1508.8).) This means that economic, **cultural** or social effects **may** by themselves ~~to~~ require preparation of an environmental impact statement. ~~When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.~~

(Emphasis indicates proposed changes to the current text.)

These proposed changes would help to change the unwritten policies of some offices within the land management agencies of protecting the health of the land to the exclusion of all other human values. These changes would also encourage the agencies to be more creative in their efforts to find ways to harmonize commercial and recreational activities with conservation goals, rather than simply furthering conservation objectives to the exclusion of all other values. More important, this policy would better further the purpose of NEPA to promote "harmony between man and his environment," 42 USC § 4321, rather than considering human activity to be the inevitable enemy of a healthy environment.

2. Require More Cooperation With Local Governments

There is already some good regulatory language requiring the federal government to cooperate with state and local governments in the NEPA process. However, the role of state and local governments continues to be largely advisory and, in actual practice, the federal agencies exercise a lot of discretion and, in many cases, barely acknowledge the local governments. The existing regulations are as follows:

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible *to reduce duplication between NEPA and State and local requirements*,^[1] unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statute).
- (4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible *to reduce duplication between NEPA and comparable State and local requirements*,^[2] unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement

¹ I recommend elimination of the italicized phrase. I believe that these regulations serve a larger purpose than merely eliminating duplication between federal and state processes, although that is certainly one benefit. The larger benefit of the regulation, however, is to give states a right to meaningful participation in the NEPA process.

² See footnote 1.

should describe the extent to which the agency would reconcile its proposed action with the plan or law.

40 CFR § 1506.2. To further strengthen state and local participation under these guidelines, I recommend the addition of the following subsections:

(e) Except where specifically prohibited by statute, state and local governments have the right to be informed at an early stage of any NEPA analysis and planning concerning national parks, national forests, or any other federal lands within their borders or, in the case of municipalities, within twenty miles thereof, and to participate as joint lead agencies in the preparation of all such NEPA documents.

(f) No document prepared pursuant to NEPA shall be complete without the concurrence and signature of the duly authorized representative of every joint lead agency.

The foregoing language would help to ensure meaningful participation by state and local governments in the NEPA process, and require the appropriate federal agency to convince the state or local government that it has adequately considered their local concerns before taking action that could be harmful to the local communities and cultures.

My philosophical commitment to local participation in federal land use decisions is explained in the enclosed article, authored by me, which appeared in the Utah Bar Journal in January 2000. This article discusses the Enlibra doctrine, a resolution adopted by the Western Governor's Association in an attempt to outline a set of general principles to guide the development of environmental policy in the West. I hope that you will give this article careful attention.

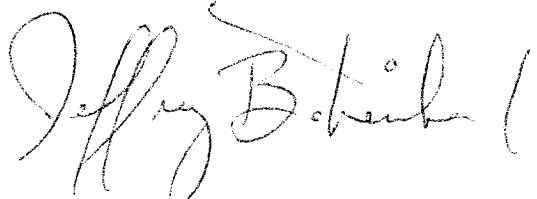
My article also discusses the Clinton Administration's frequent use of the Antiquities Act, 16 USC § 431, to impose environmental policy on western states without even consulting the affected communities. The article explains that the President used the Antiquities Act in order to avoid the consultation requirements of NEPA. The Antiquities Act was originally intended to give the President the power to designate a monument in an emergency where immediate and irreversible harm to important historic, scientific, or aesthetic resources was threatened. Changes in NEPA regulations cannot change the President's powers under the Antiquities Act. Moreover, I would not deny the President this authority. However, the President should send a bill to Congress amending the Antiquities Act. The Amendment should permit the President to make a temporary designation of a national monument in order to deal with present emergencies. However, there should be a time limit within which he must provide an Environmental Impact Statement and a fully developed management plan to the Congress for approval. The temporary designation should expire after a designated time period. My comments on this subject are brief because comments have not been requested regarding the

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Antiquities Act. However, legislative changes are needed to close the Presidential loophole with respect to NEPA compliance.

If you have further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, reading "Jeffrey B. Teichert", followed by a long horizontal flourish.

Jeffrey B. Teichert
Attorney at Law

The Enlibra Doctrine and Preserving the Unique Rural Cultures of the West

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by Jeffrey B. Teichert

James Madison said that in great republics, policy makers are "too little acquainted with all their local circumstances and lesser interests," whereas in small republics, representatives may become "unduly attached to these [local interests] and too little fit to pursue great national objects."¹ Madison further observed that "[t]he federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the state legislatures."² The current national debate over environmental protection often results in poignant conflicts between the "great national object" of environmental protection and the "local circumstances" and unique rural cultures of the West.

The Enlibra Doctrine

On February 24, 1998, the Western Governors' Association adopted a policy resolution ("Policy Resolution") entitled "Principles for Environmental Management in the West."³ The principles embodied in this resolution have come to be known as the *Enlibra* doctrine,⁴ and "are an attempt to create a centrist approach to environmental policy."⁵ The first principle of this doctrine is "National Standards, Neighborhood Solutions—Assign Responsibilities at the Right Level." The Policy Resolution reads, in relevant part:

The federal government is responsible for setting environmental standards for national efforts. These standards should be developed in consultation with the states and in the form of scientifically justified outcomes. National standards for delegated programs should *not* include prescriptive measures on how they are to be met. States should have the option of developing plans to meet those standards and ensuring that the standards are met. *Planning at the state level is preferable because it allows for greater consideration of ecological, economic, social and political differences that exist across the nation. A state can tailor its plans to meet local conditions and priorities, thereby ensuring broad community support and ownership of the plans. States can also work together to address conditions and issues that cross their boundaries. It is appropriate for the federal government to provide funds and technical assistance within the con-*

text of a state plan to achieve national standards. In the event that states do not want to develop their own plans the federal government should become more actively involved in meeting the standards.⁶

(Emphasis supplied). Among the purposes of this doctrine is to "protect the heritage and traditions in the West that are valued and advance the kind of development that will maintain the region's extraordinary quality of life."⁷ The *Enlibra* doctrine recognizes that the West's "historic base of natural resource-related industries such as farming, fishing, mining, wood products, and tourism remain central to its economy," but also recognizes the increasing diversity and transiency of the western economy and the resulting complexity of political issues surrounding natural resource utilization.⁸

The West is home to large cities, unique rural towns, and Native American tribal lands. It is as true today as it was in Madison's time that national representatives are "too little acquainted with all their local circumstances and lesser interests[.]"⁹ Laws that apply uniformly throughout the republic can have disastrous, unforeseen, and unintended effects on unique local cultures when applied in particular cases. This is vividly apparent in Utah.

The Effect of Federal Environmental Law in Rural Communities

On September 18, 1996, President Clinton used his powers under the Antiquities Act¹⁰ to designate an unprecedented 1.7 million acres of public land in southern Utah as the "Grand Staircase-Escalante National Monument."¹¹ This new monument is approximately the same size as the states of Delaware and Rhode Island combined.¹² The President undertook this designation without informing the Governor or any member of the

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Utah congressional delegation.¹⁴ Congressional investigations reveal that the Clinton Administration knew that "Utah's congressional delegation and the governor [would] be angered by the action,"¹⁴ but went ahead with it in order to curry election-year favor with environmentalists in California, Washington, Oregon, Arizona, Colorado, New Mexico, and Nevada.¹⁵ A congressional investigation, internal White House documents, and a report by U.S. News and World Report demonstrate that "the White House went to great lengths to keep secret its plan to create by executive fiat a massive 1.7 million acre national monument in southern Utah."¹⁶

Kathleen McGinty, the Chair of the President's Council on Environmental Quality ("CEQ") wrote in a confidential e-mail: "I will say again, any public release of information would probably foreclose the President's option to proceed."¹⁷ McGinty provided this advice despite her concerns that "there is a danger of 'abuse' of the withdraw/antiquities authorities especially because these lands are not really endangered."¹⁸ Similarly, Interior Department Solicitor John Leshy said, "I can't emphasize confidentiality too much. If word leaks out it probably won't happen."¹⁹

The administration feared that if news of the monument leaked to the public before the President's announcement, it would be perceived as "war on the west,"²⁰ and that "the Utah delegation [might] try efforts such as a rider on the Interior Appropriations bill . . . to prevent [the President] from taking such action."²¹ One of the major reasons the President used the Antiquities Act to specially designate the Grand-Staircase area was to avoid the requirements of the National Environmental Policy Act ("NEPA"),²² which would have required public disclosure and public comment, and would have entitled the State of Utah and affected local governments to participate as cooperating agencies in environmental studies and land use planning efforts. NEPA applies every time a decision by any federal agency constitutes "a major federal action[] significantly affecting the quality of the human environment."²³ Regulations under NEPA accord state and local governments joint planning authority if they have environmental protection or planning laws. Joint planning authority under NEPA requires federal agencies to:

Cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements . . . Such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided for by statute).
- (4) Joint environmental assessments.²⁴

One of the very purposes of NEPA is to "assure for all Americans safe, healthful, productive, and esthetically and *culturally pleasing* surroundings" and to "preserve important historic, *cultural*, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports *diversity and variety of individual choice*."²⁵

The cooperation of state and local governments would have provided a better understanding of how to best protect the environment with sensitivity and accommodation to the unique local cultures, values, and economic circumstances of the southern Utah communities affected by the President's decision. These cultures include many people who work the land as their pioneer ancestors did before them,²⁶ and who share their ancestors' love of open spaces and freedom from oppression.²⁷

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President Clinton designated the "Grand Staircase-Escalante National Monument" during a campaign-style television event at the Grand Canyon, and did not even visit Utah to announce his decision for fear of a hostile public reaction.²⁸ When the citizens of Kanab

learned of the monument designation, a hostile public reaction took place outside the scrutiny of the media. The entire town closed down and held a rally at Kanab High School, releasing black balloons "as a symbol of what had happened to Southern Utah."²⁹ The surprise monument designation threatened the loss of as many as 900 above-average salaries, the loss of a potential fifty percent increase in annual wages and salaries in Kane County, and the loss of 1.8 million dollars to local governments in the region of the monument.³⁰ These threatened losses were particularly serious in light of the fact that the three counties most seriously impacted "each suffer from subpar incomes (ranging from 26 to 41 percent below national averages) and limited growth," and had already been "hit hard by the Clinton Administration's efforts to shut down Western resource development" which had already caused business failures and significant economic dislocation.³¹

Environmental laws implicate basic questions about the relationship of human beings and their communities with the land they live on. Rigid application of national standards can, there-

fore, have unintended impacts on the unique rural, agricultural, and Native American cultures of the American West.

State governments, particularly in the West, historically have been deeply concerned with federal land use policies and for more than a century have pressed Washington for greater control over public lands within their boundaries. Since the public domain constitutes so large a portion of many western states, decisions made in Washington affecting land use can have an enormous economic, political, and social impact upon western governments.³²

The sentiments of states in the West include both environmental concerns and economic issues. Former Colorado Governor Richard Lamm worried that western public lands would be reduced to an "energy colony" for more populous and politically powerful states,³³ and former Idaho Governor and United States Interior Secretary Cecil Andrus lamented that the United States Supreme Court may decide the fate of Idaho's National Forests with "map and crayon."³⁴

The Importance of Protecting Unique Local Cultures

The Catron County, New Mexico Land Use Plan explains the importance of culture in the context of environmental regulation:

Culture is a people's identity and the foundation upon which political society and an economy are built. Without culture, without commitment to democracy, devotion to equality, and celebration of political freedom, the people of Catron County would be something less than what de Toqueville defined to be American. The citizens of Catron County are inseparable from their culture. They are, first and foremost, Americans with a deep seated commitment to democracy, equality, and political freedom. They are also unique products of a complex web of land uses and practices, values and beliefs that nurture their communities, sustain their economies, empower their local government and give form and shape to their spiritual and physical environments.³⁵

If western rural cultures are destabilized by externally imposed environmental policy, cultural values such as "self-sufficiency, hard work . . . community cohesion, collaboration and leadership associated with agrarian communities, could be altered."³⁶ These values are often grounded in an abstract "sense of

place," borne of family history, heritage, a sense of belonging, community loyalty, and personal identification with the land as "a central core of their identity."³⁷ "[P]lace makes them as much who they are as their own flesh and blood."³⁸ Assaults on "place . . . fracture the union of land and culture."³⁹ A separation of rural people from the land "would destroy the very identity of those people."⁴⁰ The value of a culture to its members cannot be understood in purely economic terms, since "human beings have been known to prefer death to violation of their cultural norms."⁴¹ Many ranchers, for instance, would simply not sell their land "for any price."⁴² Communities are most stable when cultures and customs are allowed to change through natural evolution or through the democratic processes of the communities themselves.⁴³ Uniform national environmental policies inject elements of outside control into the community, which are ultimately destructive to the local autonomy and cultural identity.⁴⁴

Cultural resources are more than persisting fragments of antiquity. Culture is also a living entity, an organic and

"Communities are most stable when cultures and customs are allowed to change through natural evolution or through the democratic processes of the communities themselves."

changing set of values, beliefs, and social forms that add richness and diversity to modern life. Significantly, federal and state laws and policies frequently ignore or dismiss the importance of contemporary culture in the management of federal and state trust lands. They preclude its

contribution, not only to the meaning and worth of local community, but its significance to society at large. Moreover, they neglect the potential it holds for improving land stewardship and enhancing the environmental potential of public lands for all Americans.⁴⁵

Unique local cultures are not only important to their own members, but also contribute to "humanity's rich diversity" and provide "a promising alternative to escalating homogenization of society."⁴⁶ A diversity of subcultures contributes to the variety of viewpoints and perspectives necessary to maintain a free society. A decline in unique rural cultures would result in "the descent toward a less centered, less self-reliant, more homogeneous [national] monoculture."⁴⁷

Jonathan Lash, the head of Vermont's environmental agency "has said that the most important innovations in environmental protection are now occurring at the state level."⁴⁸ Applying local solutions to local environmental problems is better for the environment because it relies on remedies that accommodate

the local citizens' way of life, and with which they are culturally familiar. If local solutions are adopted, the people closest to the land are less likely to perceive efforts to protect the environment as being imposed upon them by external forces that threaten their way of life. One of *Enlibra*'s stated reasons for local environmental planning is "ensuring broad community support and ownership of the plans."⁴⁹

Separation of Decision Makers from Decisions Results in Destructive Policy for the Environment and for Unique Local Cultures

One of the most difficult challenges in environmental planning in the West, for both field agents and ranchers, is attempting "to implement policy created thousands of miles east by men and women embroiled in Washington politics."⁵⁰ In much of the West, federal institutions have replaced local communities in making policy for the West's open spaces.⁵¹ Policymakers for Western public lands are completely immune from removal by the local political process. This "separation of the ruler from the ruled" follows a "colonization" model, rather than a democratic/republican model, imposing solutions on a perceived "'backward' way of life that impedes the march of progress."⁵² When the national political process affects the activities of land management agencies, it is heavily influenced by factions and special interest groups remote from the affected communities and their cultures.⁵³ This principle is illustrated by President Clinton's surprise designation of the Grand Staircase-Escalante National Monument to please environmental constituencies outside Utah.

General Comments About *Enlibra*

The focus of this article is the *Enlibra* doctrine's preference for local solutions to local problems. The other principles comprising the *Enlibra* doctrine are: "Collaboration Not Polarization—Use Collaborative Processes to Break Down Barriers and Find Solutions"; "Reward Results, Not Programs—Move to a Performance-Based System"; "Science for Facts, Process for Priorities—Separate Subjective Choices from Objective Data"; "Markets Before Mandates—Replace Command and Control with Economic Incentives Whenever Appropriate"; "Change a Heart, Change a Nation—Environmental Understanding Is Crucial"; "Recognition of Benefits and Costs—Make Sure Environmental Decisions Are Fully Informed"; and "Solutions Transcend Political Boundaries—Use Appropriate Geographic Boundaries for Environmental Problems."⁵⁴ Each of these

principles is worthy of discussion in a separate article. There is insufficient space in the present piece to make a meaningful analysis of all of them.

Enlibra has at least three important flaws. First, the Policy Resolution adopted by the Western Governor's Association fails to include any direct recognition of the importance of private property rights. Because environmental regulation involves basic issues regarding the control of land and other natural resources, it often implicates the use and enjoyment of private property. As Justice Holmes established, if the regulation of private property "goes too far" it will be recognized as a compensable taking of that property under the Fifth Amendment to the United States Constitution.⁵⁵ The defense of private property is a primary purpose for leaving the state of nature to form civil society under English social contract theory.⁵⁶ The idea that people can own property necessarily places humans in a superior position to the other creatures and elements in the natural world.⁵⁷ In recent years, some theorists of the "deep ecology" movement have argued for "reevaluating our place in nature"

"The defense of private property is a primary purpose for leaving the state of nature to form civil society under English social contract theory."

and considering humans as merely an inseparable part of the natural world with no particular superiority to any other element.⁵⁸ From this philosophical position, the "deep ecology" movement argues (using different terminology) for a retreat from civil society and a return

to the state of nature—a primal hunting-gathering society.⁵⁹ In this brave new world, no one owns anything, therefore, "everyone can take what he or she needs—so there is no need to take more."⁶⁰ Although human beings have a moral obligation to exercise wise stewardship over the bounty provided by the natural world, I cannot accept the premise that human beings' superior intelligence, moral reasoning power, and consciousness of self are of no significance in setting them apart from other creatures that act primarily on instinct.

Private property rights have served as a bulwark of individual freedom and basic *human* rights for many centuries. "[D]isability to hold property" is among the "necessary incidents" of slavery, while the right to "inherit, purchase, lease, sell, and convey property" is among "those fundamental rights which are the essence of civil freedom."⁶¹

It is important that the *Enlibra* doctrine recognize the importance of wise human stewardship over the natural world. It is equally essential, however, that the effort to exercise this stewardship not be undertaken overzealously at the expense of

cherished constitutional and human rights. As the United States Supreme Court recently stated, the right to private property, protected by the Fifth Amendment, should not be "relegated to the status of a poor relation" to other portions of the Bill of Rights.⁶²

The second flaw of the *Enlibra* doctrine is its lack of precision. Many of its principles are written so vaguely that they could be used to justify virtually any policy. Vagueness is a common flaw in documents resulting from the process of political compromise. In order to provide a coherent unifying policy direction, however, *Enlibra* must be refined.

The third flaw of the *Enlibra* doctrine is its lack of conceptual unity. It appears more like a laundry list of generalizations than a coherent body of doctrine organized on the basis of unifying themes. This problem is also common in documents that are produced as the result of political compromise. To have lasting influence in the environmental debate, however, the doctrine must produce some unifying philosophy upon which to build a framework of coherent policy. The only consistent principle running through each element of the Policy Resolution is the desire of the citizens of the West to have greater control over their own destinies while creating a healthy environment, rather than having solutions imposed by external forces. This interpretation can serve as the beginning of an effort to provide greater conceptual unity to the *Enlibra* doctrine, and thus enable its use in consistent policymaking.

Conclusion

Notwithstanding the aforementioned flaws, *Enlibra* should not be discounted. It represents a serious attempt by the elected governors of the West to articulate a theory for environmental policy formulation that is sensitive to the unique local cultures and circumstances of Western states and communities. These cultures contribute strength, diversity, and perspective to the national culture, and provide identity, moral values, and a sense of belonging and responsibility to their members. Furthermore, efforts to protect the environment are more likely to be successful if they are tailored to local needs, circumstances, and cultures, and have the support of the people closest to the land. To protect these important cultural and ecological values, the states must be vigilant to guard against unintended harm to unique local cultures by institutions which Madison characterized as "too little acquainted with all their local circumstances and lesser interests[.]"⁶³

⁶²The Federalist No. 10 (James Madison); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88(1) COLUM. L. REV. 1, 4 (1988).

²*Id.*

³WESTERN GOVERNORS' ASSOCIATION, Policy Res. 98-001 (1998), <http://www.westgov.org/wga/policy/98001.htm>.

⁴WESTERN GOVERNORS' ASSOCIATION, *Enlibra*, <http://www.westgov.org/Enlibra/>.

⁵C. Davani, *Western Governors Call for New Environmental Policies*, CASPER STAR TRIB. Feb. 24, 1999, at B-1, B-2.

⁶WESTERN GOVERNORS' ASSOCIATION, Policy Res. 98-001(B)(1) (1998), <http://www.westgov.org/wga/policy/98001.htm>; Gov. Michael O. Leavitt, *The Environment: A Down to Earth Approach*, written comments submitted to Western Governors' Association in conjunction with the Plenary Session on the Shared Environmental Doctrine (June 29, 1998). <http://www.westgov.org/wga/initiatives/enviro-whm>.

⁷WESTERN GOVERNORS' ASSOCIATION, Policy Res. 98-001(B)(1) (1998), <http://www.westgov.org/wga/policy/98001.htm>.

⁸*Id.*

⁹See note 1, *supra*.

¹⁰16 U.S.C. § 431.

¹¹Proclamation No. 6920, 61 Fed. Reg. 50221 (1996).

¹²143 CONG. REC. H7591 (daily ed. Sept. 18, 1997) (statement of Rep. Hansen).

¹³MONUMENTAL ABUSE: THE CLINTON ADMINISTRATION'S CAMPAIGN OF MISINFORMATION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, H.R. Rep. No. 105-824, 105th Cong., 2d Sess. 5, 18 (1998); BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2260, E2268, E2271 (daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands); 143 CONG. REC. H1283 (daily ed. Cong. Rec. 21, 1997) (statement of Rep. Cannon); 143 CONG. REC. H7590 (daily ed. Sept. 18, 1997) (statement of Rep. Hansen); 143 CONG. REC. H8279 (daily ed. Oct. 1, 1997) (statement of Rep. Solomon); 143 CONG. REC. H8283 (Oct. 1, 1997) (statement of Rep. Young); 143 CONG. REC. H1958 (daily ed. Apr. 29, 1997) (statement of Rep. Duncan); 143 CONG. REC. S3408 (daily ed. Apr. 22, 1997) (statement of Sen. Nickles); Memorandum from Gov. Michael O. Leavitt to his Cabinet 1 (Oct. 11, 1996) (the subject of the memorandum was "Direction on Public Land Issues in Utah").

¹⁴BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2268, 2270-2271 (daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands, Attachment 1, Memorandum from Kathleen A. McGinty, Chair of the Council on Environmental Quality ("CEQ") to President Clinton).

¹⁵BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2260, 2269-2270 (daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands); 143 CONG. REC. E2259 (daily ed. Nov. 9, 1997) (statement of Rep. Hansen).

¹⁶143 CONG. REC. H8279 (Oct. 1, 1997) (statement of Rep. Solomon quoting U.S. News & World Report).

¹⁷143 CONG. REC. H8284 (Oct. 1, 1997) (statement of Rep. Solomon).

¹⁸BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2265 (daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands, attached email from Kathleen McGinty, Chair, CEQ, to T.J. Glauthier, et al.).

¹⁹143 CONG. REC. H8284 (daily ed. Oct. 1, 1997 statement of Rep. Solomon).

²⁰BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2270-71 (daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands, attached Memorandum of Kathleen A. McGinty, Chair, CEQ, to President Clinton).

²¹*Id.*

²²BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2261, E2267.

(daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands): MONUMENTAL ABUSE: THE CLINTON ADMINISTRATION'S CAMPAIGN OF MISINFORMATION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, H.R. Rep. No. 105-824, 105th Cong. 2d Sess. 14-15, 18 (1998).

²³42 U.S.C. § 4332(C).

²⁴40 C.F.R. § 1506.2(b) (emphasis supplied); *see also* 40 C.F.R. § 1506.2(c).

²⁵42 U.S.C. § 4331(b)(2), (4) (emphasis supplied).

²⁶143 CONG. REC. H1283 (daily ed. Cong. Rec. 21, 1997) (statement of Rep. Cannon).

²⁷BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, 143 CONG. REC. E2259, E2271 (daily ed. Nov. 9, 1997) (Report of the Committee on Resources, Subcommittee on National Parks and Public Lands).

²⁸*Id.* at 2263, 2269; 143 CONG. REC. S3408 (daily ed. Apr. 22, 1997) (statement of Sen. Nickles); 143 CONG. REC. H1283 (daily ed. Cong. Rec. 21, 1997) (statement of Rep. Cannon). This is somewhat ironic in light of Vice-President Gore's earlier charge that "[President] Bush's trip to the Grand Canyon for a 'photo op' in the fall of 1991 inspired cynicism as deep as the Canyon itself." SEN. A. GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 174 (1992).

²⁹143 CONG. REC. H1283 (daily ed. Cong. Rec. 21, 1997) (statement of Rep. Cannon).

³⁰143 CONG. REC. H1959 (daily ed. Apr. 29, 1997) (statement of Rep. Duncan); MONUMENTAL ABUSE: THE CLINTON ADMINISTRATION'S CAMPAIGN OF MISINFORMATION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, H.R. Rep. No. 105-824, 105th Cong. 2d Sess. 12-14 (1998).

³¹*Id.*

³²W. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 263 (1985).

³³*Id.* at 264.

³⁴B. TURQUE, et. al, *The War for the West*, NEWSWEEK 27 (Sept. 30, 1991).

³⁵CATRON COUNTY COMPREHENSIVE LAND PLAN 2-3, adopted in Catron County Ordinance 002-93 (1993).

³⁶BUREAU OF LAND MANAGEMENT, U. S. DEP'T OF THE INTERIOR, NEW MEXICO STANDARDS FOR PUBLIC LAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 4-31, 4-43, 4-54 (1999) (Draft Statewide Resource Management Plan Amendment/Environmental Impact Statement).

³⁷Parsifal Smith-Bucquet, Women on the Range: Seeking Common Ground for Ecological Feminists and Women Who Ranch, Introductory Section (Mar. 11, 1999) (doctoral dissertation in progress at University of Arizona); BUREAU OF LAND MANAGEMENT, U. S. DEP'T OF THE INTERIOR, NEW MEXICO STANDARDS FOR PUBLIC LAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 5-59-60, E-25-31 (1999) (Draft Statewide Resource Management Plan Amendment/Environmental Impact Statement).

³⁸*Id.*

³⁹*Id.*

⁴⁰BUREAU OF LAND MANAGEMENT, U. S. DEP'T OF THE INTERIOR, NEW MEXICO STANDARDS FOR PUBLIC LAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 3-59 (1999) (Draft Statewide Resource Management Plan Amendment/Environmental Impact Statement).

⁴¹Parsifal Smith-Bucquet, Women on the Range: Seeking Common Ground for Ecological Feminists and Women Who Ranch, Introductory Section (March 11, 1999) (doctoral dissertation in progress at University of Arizona); BUREAU OF LAND MANAGEMENT, U. S. DEP'T OF THE INTERIOR, NEW MEXICO STANDARDS FOR PUBLIC LAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 3-59-60, E-25-31 (1999) (Draft Statewide Resource Management Plan Amendment/Environmental Impact Statement).

⁴²*Id.*

⁴³CATRON COUNTY COMPREHENSIVE LAND PLAN 2-18, adopted in Catron County Ordinance 002-93 (1993).

⁴⁴*Id.*

⁴⁵*Id.* at A2-19.

⁴⁶*Id.* at A-2 19-A-2 20.

⁴⁷BUREAU OF LAND MANAGEMENT, U. S. DEP'T OF THE INTERIOR, NEW MEXICO STANDARDS FOR PUBLIC LAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT 4-31, 4-54 (1999) (Draft Statewide Resource Management Plan Amendment/Environmental Impact Statement).

⁴⁸J. LESTER, *A New Federalism: Environmental Policy in the States*, in ENVIRONMENTAL POLICY IN THE 1990s 59 (N. Vig & M. Kraft ed.'s 1990) (citing P. Shabecoff, *The Environment as Local Jurisdiction*, New York Times, January 22, 1989, B9).

⁴⁹WESTERN GOVERNORS' ASSOCIATION, Policy Res. 98-001(B)(1) (1998). <http://www.westgov.org/wga/policy/98001.htm>.

⁵⁰Parsifal Smith-Bucquet, Women on the Range: Seeking Common Ground for Ecological Feminists and Women Who Ranch, Introductory Section (Mar. 11, 1999) (doctoral dissertation in progress at University of Arizona).

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴WESTERN GOVERNORS' ASSOCIATION, Policy Res. 98-001(B)(1) (1998).

⁵⁵*Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

⁵⁶J. LOCKE, TWO TREATISES OF GOVERNMENT 209, 329, 352-353, 359 (P. Laslett student ed. 1988).

⁵⁷*Id.* at 209.

⁵⁸C. MANES, GREEN RAGE: RADICAL ENVIRONMENTALISM AND THE UNMAKING OF CIVILIZATION 146-149 (1990).

⁵⁹*Id.* at 235-41.

⁶⁰*Id.* at 239.

⁶¹*Civil Rights Cases*, 109 U.S. 3, 22 (1883).

⁶²*Dolan v. Tigard*, 512 U.S. ___, 129 L.Ed 304, 321 (1994).

⁶³THE FEDERALIST No. 10 (James Madison); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88(1) COLUM. L. REV. 1, 4 (1988).

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